**W. L. Moore d/b/a W. L. Moore & Sons *and* Local 324, International Union of Operating Engineers, AFL-CIO.** Case 7-CA-17903

August 25, 1981

## DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on June 18, 1980, by Local 324, International Union of Operating Engineers, AFL-CIO, herein called the Union, and duly served on W. L. Moore, d/b/a W. L. Moore & Sons, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on August 29, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file an answer to the complaint.

On March 19, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 2, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent did not file a response to the Notice To Show Cause and therefore the allegations of the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

### Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent specifically states that unless an answer is filed within 10 days of service thereof "all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." According to the Motion for Summary Judgment, on January 15, 1981, the Regional Director wrote to Respondent informing it that Regional Office records indicated that Respondent had not filed an answer and, that if an appropriate answer were not filed by January 28, 1981, a Motion for Default Judgment would be sought. In response to Respondent's telephone request for an extension in which to file an answer a Board agent, by letter dated January 28, 1981, informed Respondent that its answer could be received no later than February 4, 1981. Service of this letter was refused. To date, no answer to the complaint has been filed. Respondent's sole written response to the Regional Office's request for an answer has been a letter dated February 2, 1981, in which Respondent asserts that it complied with the Union's request for "the audit." This letter does not meet the requirements for an answer set out in Section 102.20 of the Board's Rules and Regulations, it fails to address with specificity the one allegation in the complaint to which it might apply, and it does not even mention the additional allegations. Accordingly, we find that Respondent's letter of February 2, 1981, does not constitute an answer.

No good cause for failure to file an answer having been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted. Accordingly, we find as true all the allegations of the complaint and grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, an individual proprietor, W. L. Moore, doing business under the trade name and style of W. L. Moore & Sons.

Respondent is, and has been at all times material herein, engaged in the performance of earth moving and other heavy equipment work in the construction industry from its place of business at 7730 Joy Road, Detroit, Michigan. During the year

ending December 31, 1979, which period is representative of its operations during all times material herein, Respondent performed construction and earth moving work for enterprises at various job sites in Michigan, the value of which was in excess of $50,000. These enterprises, including Holtzman and Silverman, Inc., either individually had gross revenues in excess of $500,000 from the retail sale of homes and received at least $5,000 worth of goods and materials directly from suppliers located outside Michigan or individually engaged in nonretail business and purchased goods and materials valued in excess of $50,000 which had been delivered to jobsites and facilities within the State of Michigan directly from points outside the State of Michigan during the year ending December 31, 1979. Further, Respondent during this period purchased natural gas valued in excess of $1,000 which originated outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

Local 324, International Union of Operating Engineers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All operating engineers, mechanics, oilers, and apprentice engineers employed by the Respondent, excluding guards and supervisors as defined in the Act.

On or about May 30, 1979, Respondent and the Charging Party executed an agreement whereby Respondent agreed to be bound by the "wage rates, fringe benefits, and all other terms and conditions and provisions" contained in a collective-bargaining agreement between Charging Party and various employee groups.

At all times material herein, by virtue of the May 30, 1979, agreement and because, subsequent to said agreement, a majority of the employees of Respondent in the unit described above selected the Charging Party as their collective-bargaining representative, and the collective-bargaining contract referred to therein, the Union has been and continues to be the exclusive collective-bargaining representative of the employees in said unit within the meaning of Section 9(a) of the Act with respect to rates of pay, wages, hours, and other terms and conditions of employment.

The collective-bargaining contract referred to above provides, *inter alia*, for the payment of moneys and submission of monthly reports by Respondent to various fringe benefit funds established for the benefit of unit employees of Respondent. It further provides that Respondent, upon demand by the Union, permit the Union to audit and examine the Respondent's books and records in respect to such payments and reports to said fringe benefit funds.

Commencing on or about January 20, 1980, and continuing to date, Respondent, without first giving notice to and bargaining with the Union, has unilaterally failed and refused to file timely monthly benefit reports and to make monthly fringe benefit fund payments as is required by the agreement it signed with the Union on May 30, 1979, in which it agreed, *inter alia*, to be bound by the fringe benefit provisions of the Union's collective-bargaining contract with various employer groups. In addition, since June 5, 1980, the Union has requested and continues to request and Respondent has refused and continues to refuse to permit the Union's auditors for fringe benefit funds to examine and audit Respondent's books and records as provided for in the aforementioned collective-bargaining agreement.

Accordingly, we find that, by the acts and conduct set forth above, Respondent has since on or about January 20, 1980, refused to bargain collectively in good faith, and is refusing to bargain collectively in good faith, with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the

meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and that it take certain affirmative action designated to effectuate the purposes and policies of the Act.

In order to dissipate the effects of the unfair labor practices described in section III, we shall order Respondent to permit auditors of the fringe benefit funds to examine and audit Respondent's books and records as provided for in the collective-bargaining agreement described in section III. We shall further order Respondent to file its monthly fringe benefit reports in a timely manner as is required by the terms of said agreement. Finally, we shall order Respondent to make whole its employees by making the payments to the fringe benefit funds which should have been made pursuant to the aforesaid collective-bargaining agreement, retroactive to January 20, 1980.[1]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. W. L. Moore d/b/a W. L. Moore & Sons is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 324, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All operating engineers, mechanics, oilers, and apprentice engineers employed by Respondent, excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about May 30, 1979, the above-named labor organization has been, and is now, the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By the acts described in section III, above, Respondent has refused to bargain collectively in good faith, and is refusing to bargain collectively in good faith, with the above-named labor organization as the exclusive representative of the employees in the above-described appropriate unit, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the acts and conduct described in section III, above, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them under Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, W. L. Moore d/b/a W. L. Moore & Sons, Detroit, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 324, International Union of Operating Engineers, AFL-CIO, concerning the employees in the appropriate unit set forth below, and without notice to the Union unilaterally failing and refusing to submit monthly fringe benefit reports as required by the collective-bargaining agreement, provisions of which Respondent agreed to adopt in the agreement executed between Respondent and the Union on May 30, 1979. The appropriate unit is:

> All operating engineers, mechanics, oilers, and apprentice engineers employed by Respondent, excluding guards and supervisors as defined in the Act.

(b) Refusing to bargain collectively with the Union by unilaterally and without notice to the Union failing and refusing to make monthly payments to the fringe benefit funds as required by the above-described collective-bargaining agreement.

(c) Refusing to bargain collectively with the Union by refusing the Union's request that its auditors for fringe benefits be permitted to examine and audit Respondent's books and records as provided in the above-described collective-bargaining agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

[1] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, by evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213 (1979).

(a) Honor and abide by those terms and conditions of employment provided for in the collective-bargaining agreement which were adopted in the agreement entered into by W. L. Moore d/b/a W. L. Moore & Sons and Local 324, International Union of Operating Engineers, AFL-CIO, on May 30, 1979.

(b) Grant the Union's request that its fringe benefit auditors be permitted to examine and audit Respondent's books and records.

(c) Submit fringe benefit reports as required by the above-described collective-bargaining agreement.

(d) Make the unit employees whole by making all fringe benefit contributions as provided for in the above-described collective-bargaining agreement in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(e) Post at its Detroit, Michigan, location copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Local 324, International Union of Operating Engineers, AFL-CIO, by unilaterally and without notice to the Union failing and refusing to submit monthly benefit reports as required by the collective-bargaining agreement, provisions of which we agreed to adopt in the agreement executed between us and the Union on May 30, 1979.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to make monthly payments to the fringe benefit funds as required by the above-described collective-bargaining agreement.

WE WILL NOT refuse to bargain collectively with the Union by refusing the Union's request that its auditors for fringe benefits be permitted to examine and audit our books and records as required by the above-described collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise or the rights guaranteed them in Section 7 of the Act.

WE WILL honor and abide by those terms and conditions of employment provided for in the collective-bargaining agreement which were adopted in the agreement entered into by us and the Union on May 30, 1979. The appropriate unit for the purpose of collective bargaining is:

> All operating engineers, mechanics, oilers, and apprentice engineers employed by W. L. Moore d/b/a W. L. Moore & Sons, excluding guards and supervisors as defined in the Act.

WE WILL submit fringe benefit reports as required by the above-described collective-bargaining agreement.

WE WILL make the unit employees whole by making all fringe benefit contributions to the fringe benefit funds as required by the above-described collective-bargaining agreement, retroactive to January 20, 1980.

WE WILL grant the Union's request that its fringe benefit auditors be permitted to examine and audit our books and records as required by the above-described collective-bargaining agreement.

W. L. MOORE D/B/A W. L. MOORE & SONS